1966

James H. Powers v. Industrial Commission of Utah & Salt Lake City Corporation : Respondent's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES H. POWERS,
Plaintiff & Appellant,

vs.

INDUSTRIAL COMMISSION OF UTAH & SALT LAKE CITY CORPORATION,
Defendants & Respondents.

Case No. 10587

RESPONDENT'S BRIEF

Appeal from Order of The Industrial Commission of the State of Utah

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STATEMENT OF THE CASE

The appellant in this action claims disability consisting of the aggravation of a pre-existing heart conditon by reason of an accident arising out of or in the course of his employment as a fireman for Salt Lake City Corporation.

STATEMENT OF FACTS

The facts as set forth in the appellant's brief have been carefully selected to present the most favorable impression for his position in this appeal thereby requiring this respondent to point out the evidence which has been omitted in the appellant's statement of facts.

The appellant claims that he suffered an accident in the course of his employment as a fireman for Salt Lake City on September 25, 1963, which resulted in his total disability commencing on April 7, 1964. The alleged "accident" of September 25, 1963, consisted of responding to a fire alarm at 1:39 A.M. on that date from Fire Station No. 4. He testified that he had gone to bed about 10:30 P.M. and that he felt weak and dizzy as he got out of bed to respond to the fire alarm. (R. 38-39). He put on his "hurryups" (pants and boots which are kept at the side of his bed for fast dressing) and responded to the tailboard of the fire engine. (R. 39). He was sleeping on the main floor of the fire station and ran 40-50 feet from the dormitory to the back of the truck. (R. 51-52, 120). As they pulled out of the fire station he had severe pains in his abdomen above his diaphragm and extending to his shoulder. (R. 39). About two blocks from the station he lapsed into unconsciousness and the next thing he remembered he was sitting on the tailboard of the truck at the address of the reported fire having dry heaves. (R. 40). The fire alarm was a false alarm and the appellant did not engage in any firefighting activity on that

occasion. (R. 122). He was taken back to the fire station in Captain Donaldson's car where he was advised by his superior officers to go home but he refused to do so because he did not want to upset his wife and disturb her rest. (R. 40-41). He also testified that his wife was having female trouble and the doctor didn't know whether it was malignant or non-malignant and that he was worried about her condition. (R. 42-43). Subsequent testimony revealed that Mrs. Powers had a tumor in her uterus which was diagnosed by Dr. Carl T. Woolsey at the very beginning of September in 1963, that she decided to have it removed by surgery in November, but the actual operation was delayed until after the Christmas holidays and that she didn't know until after the operation in January or February whether she might have had cancer or not. (R. 116-118).

Mr. Powers continued to perform his duties as a fireman following the incident on September 25, 1963. Although he testified that he continued to have chest pain which was less severe than the above episode, he did not seek medical attention until March 16, 1964, at which time he first consulted with Dr. Null. (R. 42-43). On April 7, 1964, he was hospitalized after passing out and has been disabled since that time. (R. 44-45).

Contrary to established procedure, the Industrial Commission Referee permitted the appellant to present medical evidence from Dr. Francis Clyde Null at the

original hearing prior to referring the case to a medical panel as required by law. (R. 15-16). Dr. Null testified that he first saw Powers on March 16, 1964, and his examination revealed that Powers was afflicted with an electrocardiographic abnormality designated as the Wolff-Parkinson-White syndrome and was suffering from an atherosclerotic heart disease, commonly called hardening of the arteries, with an associated severe anginal syndrome. (R. 18). It was also established thereafter that Powers had a high blood fat level. (R. 19). Dr. Null testified that the pain Powers complained of was caused by an insufficient blood supply to the heart muscle and is called angina pectoris. (R. 19). His pain is directly related to, and is a consequence of, his having atherosclerotic heart disease. (R. 20-21). Dr. Null testified that atherosclerotic heart disease is a process whereby the arteries become narrowed with fat and calcium deposits greatly diminishing the blood supply to the heart muscle. (R. 23). He testified that the pain suffered by such a patient is only a symptom of the disease, that the disease itself is a pre-existing condition which necessarily existed prior to the time that the pain became apparent, that the artery restriction caused by the fatty deposition occurs over a considerable period of time, and that it is very unlikely that stress or exercise would be the sole cause of this disease. (R. 28-29). He stated that chronic stress and chronic anxiety tend to greatly accentuate the symptoms in this particular disorder. (R. 24). It was his opinion that the events described by Powers as occur-

ring on September 25, 1963, did aggravate his underlying heart disease. (R. 26). Dr. Null testified that the question of whether Powers suffered a myocardial infarction on April 7, 1964, when he was hospitalized, was raised but that they were not able to show conclusively that he had sustained any severe injury to the heart muscle itself. (R. 21). Subsequent to that occurrence, however, he had increasing limitation of activity to the point of being unable to do ordinary work. (R. 21).

Following the original hearing the case was referred to a medical panel consisting of Dr. L. E. Viko, Chairman, Dr. Irving Erschler and Dr. Kenneth A. Crockett, to investigate the medical aspects of the appellant's claim. (R. 74). The chairman of this panel secured a complete medical report from Dr. Null, including electrocardiagrams. (R. 78-80). In that report Dr. Null reported that the pain suffered by Mr. Powers in March, 1964, could be induced by intense emotional aggravation, exercise or sexual intercourse. His patient at that time related the incident of September 25, 1963, but stated that he had suffered "infrequent" pain subsequent thereto until January of 1964, when the pain became much more frequent causing him to seek medical attention. Dr. Null noted in his report that "(i)t was significant that a brother age 40 years had severe coronary artery disease and another brother age 37 years was said to have heart disease which had not been known to be associated with either metabolic disease or obesity," and that "his mother age 59 years had heart

disease of an unspecified type." In that report Dr. Null stated:

> "Subsequent to the initial observation Mr. Powers was felt to exhibit not only the Wolff-Parkinson-White Syndrome on a congenital basis but also hypercholesterolemia and a syndrome of angina pectoris presumedly associated with *premature* atherosclerosis on the basis of hypercholesterolemia." (Emphasis added.)

With permission from Dr. Null, the chairman of the medical panel reviewed the appellant's St. Marks Hospital record resulting from his admission on April 7, 1964, and prepared a summary of that record. (R. 81-82). It is interesting to note that the hospital record stated *that the appellant was well until two months before admission,* when he had the onset of squeezing, precordial pain with radiation to the ulnar side of the left arm which was known to be associated with Woolf-Parkinson-White syndrome and familiar hypercholesterolemia, the patient's own serum cholesterol being approximately 400. The discharge summary was to the effect that a man *with known atherosclerotic heart disease of 3 months duration* and a family history including two brothers who have arteriosclerotic heart disease showed no positive evidence of a myocardial infarct in serial electrocardiograms. Dr. Viko also reviewed the electrocardiograms.

Based upon the foregoing, the medical panel made its report to the State Industrial Commission which was concurred in by each member of the panel. (R.

86-88). In that report the panel concluded as follows with respect to its evaluation of the medical aspects of this case:

> "In view of the fact that the Panel finds no evidence of a myocardial infarction from the episode of September, 1963, and even granting that an attack of angina pectoris may have been precipitated by the occupational events of that evening, the Panel finds it hard to accept the idea that the occupational events of that evening and the attack of that evening were sufficient to aggravate pre-existing coronary-artery disease to the point of progressive and disabling heart disease. The subsequent events after September, 1963, may reasonably be explained as part of the natural course of coronary artery disease."

At a hearing on appellant's objections to the report of the medical panel in this case, Dr. Viko testified that the panel had considered the entire file and transcript in this matter, together with Dr. Null's letter to the medical panel and the hospital record which he had reviewed and summarized. (R. 97-98). He also testified that all three doctors on the panel had reviewed the entire file and assisted in dictating the final report. (R. 98).

Following the hearing on appellant's objections to the medical report the referee referred the entire matter back to the medical panel on the question of aggravation of a pre-existing heart condition. (R. 122). The medical panel submitted its second report in which it reiterated its conclusion in the original report

and concluded that the material brought out at the second hearing would not change the opinion of the panel. (R. 125-126). The matter was then submitted to the State Industrial Commission without further hearing upon the stipulation of the appellant's counsel. (R. 132). The Commission received the reports of the medical panel in evidence and adopted such reports in denying the appellant's claim. (R. 138). Petition for rehearing was denied (R. 140) and appellant brought this appeal on a petition for writ of certiorari. (R. 141-145).

ARGUMENT

POINT I

THE DENIAL OF APPELLANT'S CLAIM WAS SUPPORTED BY THE EVIDENCE.

The appellant lays much weight upon the statement of the Industrial Commission that there was no "unusual exertion or unusual emotional stress" involved in the incident of September 25, 1963, upon which the appellant relies as constituting the "accident" in the course of his employment which entitled him to workmen's compensation benefits. The fallacy of the appellant's argument in this regard arises from the fact that the sole question to be decided in this case was whether the occupational events on the date in question were of such nature as to aggravate a pre-existing heart con-

dition to the point of progressive and disabling heart disease. In other words, was there a causal connection between the disability and the occupational events? This the Industrial Commission found contrary to the appellant's contention and its finding was fully substantiated by the medical panel report upon which it relied. The medical evidence in this case clearly established that the disability suffered by Mr. Powers was the result of a progressive type of heart disease and the pain suffered by him had been precipitated by a diminishing blood supply to the heart muscle caused by the narrowing of the supplying arteries through the deposition of fat and calcium therein. Appellant's own doctor, Dr. Null, testified that pain was only a symptom of the disease and that the underlying cause of the pain had been developing over a considerable period of time. Even Dr. Null recognized that it required "acute strenuous exercise" and "acute emotional upsets" to aggravate the heart condition of one predisposed to atherosclerosis. (R. 24). He even referred to the development of pain in the appellant on the night in question as the result of "acute exertion of that moment." (R. 30). It thus becomes apparent that the question of aggravation of the pre-existing heart condition in this case and the causal relationship between the occupational events and the disability of the appellant does indeed involve "unusual exertion" as a factor in the case. In this light the medical panel found that the appellant's disability which developed six months following the claimed accident could "reasonably be

explained as part of the natural course of coronary artery disease" even assuming that the occupational events had precipitated an attack of angina pectoris on September 25, 1963.

The appellant cites the case of *Purity Biscuit Company v. Industrial Commission,* 115 U. 1, 201 P.2d 961, as authority for the abolition of the unusual strain test in workmen's compensation cases in Utah. But in so doing the appellant carefully omitted the court's observations relating to causal connection between the work and disability. Thus at page 969 of 201 P.2d Reporter the main opinion states as follows:

> " * * * We again wish to make it clear that we do not intend to dispense with that requirement that in a case of this kind where the employee suffers an internal bodily failure or breakdown the burden is on the applicant to show that the exertion was at least a contributing cause thereof. In other words, we are not abandoning the requirement that in cases where disease or internal failure causes or is the injury there must be a causal connection between the employment and the injury."

In a concurring opinion in that case Justice Wolfe addressed himself to the very problem involved in the instant case at page 970 of 201 P.2d Reporter:

> "The first requisite for the payment of compensation under the Workmen's Compensation Act is that the injury which caused the disability must have been employment connected. * * * But compensation cannot be paid merely because the

disability or death occurred in the duration of the employment. 'In the course of his employment' connotes more than in the duration of the employment. Functions performed by the employee in furtherance of the industry in which he is employed must be a material contributing factor to the death or disability. The problem of the Commission in these cases where the disability or death occurs by an internal failure contemporaneous with exertion attendant upon the work or soon thereafter, is to determine whether the exertion was a causative factor of the death or injury or merely coincidental with the employment. When the exertion is comparatively mild and of a kind which usually attends the kind of work the employee has been doing and disability or death results, then it would appear to me that the proof that it was a material contributory factor to death or disability should be clear and convincing. The more mild the exertion, the more likely that the internal failing was merely coincidental. If, on the other hand, the death or disability occurs contemporaneously with or soon after an extraordinary exertion performed in the course of employment, there would appear to be a more definite basis for an inference that the work was a paramount contributing cause. * * * In the case of Dee Memorial Hospital Ass'n v. Ind. Comm., 104 Utah 61, 138 P.2d 233, the employee was exerting himself beyond the point called for by his usual work. The pains which ensued and which it was later found by consultation with the doctor indicated a coronary heart disorder and which required prolonged rest were tied into the work of moving fairly heavy boxes and 100 pound sacks of fire clay. Had those same pains come

during exertion in his usual work, the problem of determining whether *that exertion* had aggravated a previously existing heart disease or the aggravation was simply the result of a normal progression of the heart disease might have been more difficult, but it would still have been for the commission to resolve."

Justice Wolfe had this to say in determining whether the Industrial Commission has acted unreasonably or arbitrarily in doubtful cases of internal injury:

> "Where the death or disability occurs under such circumstances as to present prima facie doubt as whether it was caused by exertion incidental to the work, or an event which occurred only in the duration of the work and in regard to which the work furnished no material or efficient concurring or cooperating cause, then, before a favorable award is made, it should appear by clear and convincing evidence that the exertion in pursuance of the work was at least an efficient cooperating cause of the disability or death. The commission should have clear and convincing proof that the exertion done as part of the work, whether ordinary or extraordinary, was a factor which materially contributed to or caused the death or disability."

The question of the causal connection between appellant's disability and the occupational events of September 25, 1963, certainly was a matter to be decided by the Industrial Commission in this case and the "clear and convincing" evidence claimed by the appellant to require a reversal of the commission's order simply does not exist. It should be borne in mind that

the disability in this case did not occur until six months after the claimed accident, during which time the appellant did not seek medical assistance. Furthermore, the appellant was confronted with a constant worry relating to his wife's health from a time preceding the date in question until January or February thereafter when surgery revealed her condition to be non-malignant. The hospital records at the time Powers was hospitalized in April, 1964, indicate that the patient's condition was atherosclerotic heart disease of 2-3 months duration which certainly is not consistent with his claim that his disability was precipitated by his work more than 6 months previous thereto. The same hospital records confirmed Dr. Null's findings of similar heart disease in two brothers of the appellant. The evidence of exertion indicated that Powers had only to slip into his hurryups, run 40-50 feet to the truck and climb on the tailboard of the truck which was considerably less physical activity than his usual occupational duties for the fire department. Under these facts, together with the entire medical record involved, the medical panel, consisting of three doctors whose knowledge, experience and professional competency certainly qualified them for their assignment, agreed that in their opinion the occupational events of that evening were insufficient to aggravate Powers' pre-existing coronary artery disease to the point of progressive and disabling heart disease and that his subsequent disability could reasonably be explained as part of the natural course of coronary artery disease. It should be noted that the "un-

disputed" evidence claimed by the appellant to sustain his position consists of the medical opinion of Dr. Null based solely upon the same background of facts as above set forth, for Dr. Null did not see the patient until six months after the incident involved. The medical panel adopted Dr. Null's diagnoses in this case which were made after his first examination of Powers in 1964, but they did not agree with his *opinion* as to the causal relationship between the occupational events of September 25, 1963, and Powers' subsequent disability which occurred on April 7, 1964. The Industrial Commission accepted the opinion of the 3-man medical panel rather than the opinion of Dr. Null which it had every right to do.

The appellant also misconceives the function of the medical panel in a case such as this. His argument seems to proceed upon the premise that the panel itself is the referee or judge in the dispute and must accept the opinion of Dr. Null as the "undisputed" medical evidence of cause and effect. Of course, this is absurd. Under Section 35-1-77, Utah Code Annotated 1953, it is mandatory for the Industrial Commission to refer the medical aspects of a case such as this to a medical panel to make such study and report as it may determine. Under that statute the report of the medical panel can be considered as evidence in the case by the commission and the medical panel report was received in evidence in this case. Thus it was for the commission to determine from all the medical evidence before it the causal relationship between the employment activities

of the appellant and his subsequent disability. The rule has been firmly established in this court that, where the evidence is conflicting as to whether an accident arose out of or in the course of the employee's employment, the finding of the commission will not be reviewed on appeal. *Norris v. Industrial Commission,* 90 U. 256, 61 P.2d 413; *Commercial Casualty Insurance Co. v. Industrial Commission,* 71 U. 395, 266 P. 721; *Callahan v. Industrial Commission,* 104 U. 256, 139 P.2d 214.

CONCLUSION

It is submitted by this respondent that the order of the Industrial Commission denying appellant's claim was supported by the evidence and should be affirmed.

Respectfully submitted,

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